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IN THE

Supreme Court of the United States

October Term, 1953

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No. 387

JULIA GALLAGHER, as Administratrix of the Estate of JAMES GALLAGHER, deceased,

Petitioner,

—and—

JULIA GALLAGHER,

Plaintiff,

—v.—

UNITED STATES LINES COMPANY,

Respondent,

—v.—

T. HOGAN & SONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP F. DiCOSTANZO
Attorney for Petitioner

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Julia Gallagher, as Administratrix of the Estate of James Gallagher, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 6, 1953.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (R. 153) has not yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered July 6, 1953 (R. 157). The jurisdiction of this Court is invoked under 28 U. S. C. 2154(1).

Questions Presented

Whether in a case of a longshoreman injured aboard a vessel in navigable waters, moored to a dock in New York, by reason of the use of equipment owned and operated by the stevedore contractor not reasonably safe for the unloading work being performed, the shipowner is liable in damages for unseaworthiness and/or for negligence in failing to use reasonable care to disapprove and prevent the use of unsafe equipment.

Statutes and Regulations Invoked

There are no statutes or regulations involved.

Statement

Virtually all the facts which are material to a consideration of the within petition were stipulated before trial by all parties:

"3. The parties stipulated the following facts:

"James Gallagher was employed by T. Hogan & Sons, Inc. on the 10th day of July, 1950 in the capacity of a longshoreman and was assigned by his employer to work with a gang aboard the *SS. American Inventor* unloading cargo from No. 3 hatch. While in the No. 3 lower hold, in the square of the hatch, he was injured when struck by a falling bale of scrap rope. The bailed rope was part of a general cargo which was being discharged by T. Hogan & Sons, Inc., an independent contracting stevedore, from the vessel to the loft of pier 60, North River, New York City.

"The vessel was owned by United States Lines Company and, except for those portions and appliances of the vessel necessary for the discharge of cargo, which were being operated by T. Hogan & Sons, Inc. for the purpose of unloading cargo, was operated by United States Lines Company.

"United States Lines Company had employed T. Hogan and Sons, Inc. to discharge the *SS. American Inventor,* pursuant to the terms of an agreement dated January 1, 1950.

"The vessel had arrived at Ambrose Light Vessel at 1:21 a. m. on July 10, 1950. It was docked at North side of Pier 60, North River at 9:45 a. m. Longshoremen employed by T. Hogan & Sons, Inc. began discharging operations at hatches 2 and 3 at 10:15 a. m. and stopped at 12 noon. They resumed discharging operations at hatches 2 and 3 at 7 p. m. and continued up to and after the accident at 9:35 p. m.

"The cargo was discharged by T. Hogan & Sons, Inc. by means of an airplane skid which belonged to T. Hogan & Sons, Inc. and which was provided by it. The airplane skid was a platform made of wood,

measuring 5 feet x 8 feet. On each of the narrow ends of the platform, near the corners, there were two eyes protruding a few inches above the surface. These eyes were made of metal and were the ends of steel bands running under the platform from one end to the other. These steel bands were bolted to the platform. In discharging the cargo, the skid was raised from the hold by means of a bridle at the end of the ship's falls. The bridle consisted of 4 wire ropes attached to a common point which, in turn, was attached to the cargo hook on the ship's falls. At the other end of each wire rope was a metal hook. These hooks fitted the eyes of the airplane skid and during unloading operations were set into the eyes of the skid by employees of T. Hogan & Sons, Inc., working in the hold.

"Shortly before the accident, the longshoremen loaded the airplane skid lying in the inshore wing of the hold with two large bales of scrap rope weighing from 600 to 800 lbs. each and two small bales atop the large ones, the small bales weighing from 75 to 100 lbs. each. When the airplane skid was loaded, the next operation was to place the four hooks of the bridle, which was attached to the cargo hook, into the four eyes of the airplane skid. When this was supposed to have been done, they then gave a signal which was transmitted to the winchman on deck, whereupon the airplane skid, with its cargo loaded thereon, as indicated, was lifted by means of the power of the winches and moved to the square of the hatch. Upon another signal, it was lowered by the winches so as to rest on a crate for the purpose of steadying. At this time it was observed that one of the hooks was out of its eye. One of the longshoreman undertook to place this hook in its eye and, when he indicated that he had finished with his

undertaking, upon another signal being given by one of the longshoremen, the airplane skid, with its load of scrap rope, was raised by the power of the winches through the hatchway. When it had been raised to a level in the hatchway between the upper and lower tween decks, it was observed that one of the hooks was out of its eye. It was also observed that the corner of the skid where the hook was out of the eye was tilting downward and that the bales of scrap rope fell from the skid through the square of the hatch to the hold.

"The plaintiff was struck by one of the falling bales of rope. The injuries for which the plaintiff is suing were suffered as a consequence of his being struck by the falling bale of rope.

"On the first trial, James Nash, an employee of Hogan, called as a witness by United States Lines Company, testified that on the first occasion when one of the hooks was observed to be out of its eye, he put it in the eye; that he did not remember whether he put the hook with the point toward the skid or with the point away from the skid, and that he did not think that it made any difference in respect of safety.

"The accident happened at approximately 9:35 p. m.

"No claim is made that there was ever anything unseaworthy, improper, or defective so far as concerns the vessel itself and its appliances.

"The damages allegedly sustained by plaintiff occurred through injuries sustained by plaintiff arising out of and in the course of his employment by the third-party defendant upon the navigable waters of the United States and within the provisions of said Act.

"The sole agreement between third-party plaintiff, United States Lines Company, and third-party defendant, T. Hogan & Sons, Inc., with respect to the unloading of the *S.S. American Inventor* on July 10, 1950, was the written contract of January 1, 1950 referred to in paragraph "Fourth" of the third-party complaint.

"United States Lines Company did not supervise T. Hogan & Sons, Inc. or any of its employees in the performance of any T. Hogan & Sons, Inc.'s stevedoring activities, but relied, for the proper performance of the stevedoring work in all its details, on the performance by T. Hogan & Sons, Inc. of its contractual obligation to United States Lines Company.

"United States Lines Company had no actual prior knowledge of any act or omission of any employee of T. Hogan & Sons, Inc., which may have been the cause of the bridle hook's being out of the eye of the airplane skid at the time when the airplane skid had been raised in the hatchway immediately preceding the accident" (R. 24-27).

It was further stipulated that had the ship owner supervised the stevedore's activities, it would have been possible for it to have directed the use by the stevedore of some other method to discharge the cargo in question (R. 28).

The written agreement between the ship owner and the stevedore contractor (R. 115-131) provided, *inter alia,* that the stevedore "shall * * * furnish all gear and equipment * * * including slings * * * necessary for proper and expeditious loading and discharge * * * " (R. 119).

Clause 11 (a) which appears at R. 120, 121 reads as follows:

"(a) The Contractor shall remove and handle cargo, mail, and passenger baggage from the piles on the pier or in the pier sheds, or from cars, barges, lighters, scows or booms alongside, and stow the same in any part of the ship including deep tanks, 'tween decks, bunker space, fore and after peaks, and any other part of the ship and/or on the ship's deck in the order directed by and manner satisfactory to the Owner or its authorized agents or the Master of the ship or his agent; and the Contractor shall discharge cargo, mail, and passenger baggage from any part of the ship including deep tanks, 'tween decks, bunker space, fore and after peaks, and any other part of the ship or from deck onto pier or into pier sheds, or into or onto cars, barges, lighters, scows or booms alongside the ship, and pile the same on the pier or in the pier sheds in the order directed by and manner satisfactory to the Owner or its authorized agents. The Contractor performing any service required by this contract shall use such equipment approved by the Owner as is best adapted for the proper and safe handling of the cargo, passenger baggage, and mail; and shall be responsible for any and all loss or damage to cargo or other property, including coopering or repairing packages damaged, while handling or stowing same, when occurring through the neligence or fault of the Contractor, his employees and servants. If such coopering or repairing is done by the Owner's employees, the Contractor shall reimburse the Owner to the extent of the actual cost of such work."

The foregoing clause was treated as pivotal by two District Court Judges and the Court of Appeals. The Court of Appeals said:

> "Consequently, in the case at bar United's liability turns on the interpretation of the contract between it and Hogan in respect to the control retained by the former over the stevedore's activities. * * *" (R. 156).

The case was tried twice. The first trial resulted in a disagreement of the jury. The second Trial Court charged the jury, *inter alia,* following substantially the first Trial Judge's charge, as follows (R. 71):

> "I have ruled as a matter of law that by reserving to itself such power of approval of the equipment, the United States Lines had the power to require Hogan to use proper equipment for the safe handling of the cargo, and, if it were so minded, could direct them to refrain from using the airplane skid in the event it decided that such a skid was not a proper and safe way for the handling of the cargo. As a result of this reserved contractual power, I charge you that the United States Lines had a duty toward the plaintiff Gallagher to exercise reasonable care for his safety in seeing to it that the equipment used by T. Hogan was safe and proper for the use to which it was put. The fact that Hogan, as Gallagher's employer, was under a duty to provide him with a reasonably safe place to work does not relieve the United States Lines of its duty to Gallagher."

Upon the second trial, the jury found, *inter alia,* in answer to special interrogatories, that the equipment in question was not a reasonably safe piece of equipment for the purpose to which it was put to use (R. 97) and that the failure of the ship owner to disapprove and prevent the use of that equipment constituted a failure to exercise

reasonable care (R. 97) and that such negligence was a proximate cause of the injuries (R. 98). The jury accordingly rendered a verdict for the plaintiff in the amount of $250,000. The injuries were grievous—no question was raised by the ship owner on its appeal relating to the amount of damages.

On appeal, the judgment for the plaintiff was reversed and the cause remanded with directions to enter judgment in favor of the ship owner.

In the unanimous opinion of the Court below, by Judge Augustus N. Hand, the Court held that the accident having happened in New York, the New York law governed and that the only basis under that law for finding a duty on the part of the ship owner to the longshoreman-plaintiff was the contractual reservation by the ship owner of the power to approve the equipment that the stevedore used. The Court went on to say that "We do not think that by giving United (the ship owner) a general power to approve the equipment to be used the intent of the parties to this contract was to reserve to United the detailed control that would make it liable for the injury to the plaintiff's decedent" (R. 156).

The Court below, interpreting the contract in the light of New York cases which it cited, decided that the ship owner did not have the requisite quantum of control for liability to be fastened upon him for negligence. The question of unseaworthiness of the vessel by reason of unsafe gear which the longshoremen brought aboard and used was not discussed.

The liability of the ship owner was made to turn exclusively on the interpretion of the contract in respect to the control retained by the ship owner.

Specification of Errors to be Urged

The United States Court of Appeals for the Second Circuit erred:

1. In failing to hold that the vessel was unseaworthy and that the ship owner was absolutely liable for injuries occurring in consequence of such unseaworthiness, by reason of the fact that the stevedore was permitted to bring aboard and use its equipment which was not reasonably safe for the ship's purpose to which it was put.

2. In holding that the liability of the ship owner to a longshoreman for an injury which occurred upon the navigable waters of the United States (R. 27) was governed by the law of the State of New York.

3. In applying the doctrine that the ship owner's duty to the longshoreman under the facts herein is a concomitant of control.

4. In holding that although the ship owner had a general power to approve the equipment, he did not have the detailed control that would make him liable for the injury.

5. In reversing the judgment of the District Court and directing judgment in favor of the ship owner.

Reasons for Granting the Writ

The questions presented are of tremendous importance to the steamship industry and the stevedoring industry

throughout the United States, and extend far beyond the question of this petitioner's right to recover. The importance of the adjustment of the legal relationships between steamship owners and operators, on the one hand, and stevedores and longshoremen on the other, has often been recognized by this Court. This is attested by the large number of cases in which certiorari has been granted by this Court dealing with this branch of law.

The within decision deals with a prototype of a state of facts which is constantly recurring and on which this Court has not directly expressed itself.

The within decision has narrowed the potential liability of steamship companies to longshoremen who sustain injury to a degree not contemplated by existing law. The instant decision of the Court of Appeals for the Second Circuit embodies its categorical erroneous answer to a question concerning the uniformity of maritime law about which that very Court has relatively recently reflected its own doubts. We submit that a decision on an important question has been made, which not only conflicts in principle with cases decided in this Court and Courts of Appeals for other circuits, but which also it is respectfully submitted, is wrong.

1. In failing to hold that the vessel was unseaworthy by reason of the fact that the equipment which the ship owner permitted the stevedore to bring aboard and use was not reasonably safe for the ship's purpose to which it was put, the decision of the Court of Appeals conflicts in principle with the decision of the Court of Appeals for the Ninth Circuit in *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478,

decided June 19, 1953 by the Court of Appeals for the Ninth Circuit.

In said opinion (William Denman, Chief Judge) the Court held that where a longshoreman who is employed by a stevedore contractor is injured while working on board ship as the result of the breaking of an unseaworthy block furnished by the stevedore, the ship owner is absolutely liable.

The Court, interpreting the decision of this Court in the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, described the duty of the ship owner with respect to seaworthiness, in the language of the *Sieracki* case itself, as "'a form of absolute duty owing to all within the range of its humanitarian policy'" and further as "'peculiarly and exclusively the obligation of the owner. * * * one he cannot delegate.'" The Court further stated that it cannot be assumed that the *Sieracki* case intended that the stevedore should lose this protection merely because his immediate employer had temporarily assumed control of a portion of the ship without becoming the owner *pro hac vice.*

There is no consideration whatever given in the opinion in the instant case to the question of whether the vessel was rendered unseaworthy by reason of the stevedore's bringing aboard and using equipment not reasonably fit for the purpose to which it was put to use.

The conflict between the Second Circuit [and the Third Circuit] on the one hand, and the Ninth Circuit, on the other hand, is one which the *Petterson* case explicitly recognizes. At page 479 of its opinion, the Court says:

> "Appellee argues that even if the unseaworthiness of the block is shown, it is not liable because

> control of that portion of the ship upon which Petterson was working had been surrendered to Stevedoring Co. In so contending they rely, as did the court below in its decision, upon the 'relinquishment of control' doctrine which has been adopted in the Second and Third Circuits. That doctrine is that a shipowner is under an initial duty to provide a seaworthy ship; but that this duty is a concomitant of control, and the shipowner is not liable for unseaworthiness which arises after control of the ship, or that part which includes the unseaworthy condition, has been surrendered to the stevedores. Mollica v. Compania Sud-Americana, 2 Cir., 202 F. 2d 25; Lopez v. American Hawaiian Steamship Lines, 3 Cir., 201 F. 2d 418; Lynch v. United States, 2 Cir., 163 F. 2d 97; Lauro v. United States, 2 Cir., 162 F. 2d 32; Grasso v. Lorentzen, 2 Cir., 149 F. 2d 127, certiorari denied, 326 U. S. 743, 66 S. Ct. 57, 90 L. Ed. 444."

In the concluding paragraph Judge Denman says:

> "* * * The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here."

The parallel between the instant case and the *Petterson* case, *supra,* is compelling. In each, stevedore's equipment and not ship's equipment is involved. A vessel is equally unseaworthy when stevedore's defective equipment breaks (*Petterson* case *supra*) as when such equipment fails because not reasonably safe for the ship's purpose to which it is put to use as in the case at bar. Viewed in this light,

the instant case is directly in conflict with the *Petterson* case and not merely in conflict in principle. If the *Petterson* decision be correct, the instant decision must be wrong.

2. In holding that the liability herein was governed by the law of the State of New York, the Court of Appeals for the Second Circuit pays little heed to the lack of warrant for doing so in any case decided by this Court. The decision conflicts with the decisions of this Court in *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449, at page 457; *Messel* v. *Foundation Co.*, 274 U. S. 427; and *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502 at page 514, which followed *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 and held that in cases closely parallel to the case at bar the law of the sea displaced the local law.

That the problem of which law is applicable under circumstances such as those presented here has previously given the Court of Appeals for the Second Circuit some little hesitation as is seen from its own decision in *Guerrini* v. *United States*, 167 F. 2d 352, decided March 31, 1948 (cert. den. 335 U. S. 843 — October 18, 1948). The Court in the *Guerrini* case says [(pp. 354-355), referring to the decisions of this Court just above cited]:

> "• • • Whether those decisions are still law depends upon what is left of the whole doctrine of Southern Pacific Co. v. Jensen, supra, which has proved to the last degree difficult in application, even in the field of workmen's compensation where it arose. • • • "

In the *Guerrini* case, the Court of Appeals refers also to the case of *Riley* v. *Agwilines Inc.*, 296 N. Y. 402, 405 (decided May 22, 1947). The additional anomaly appears

that the Court of Appeals for the Second Circuit here applies New York law to a situation wherein the highest court of the State of New York has held in *Riley* v. *Agwilines, supra,* that New York law does not govern but the law of the sea does. The New York Court of Appeals says (pp. 405-406):

> "Since it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law (*Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149), we must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal courts . * * * "

In *W. E. Hedger Transp. Corp.* v. *United Fruit Co.* [decided by the Court of Appeals for the Second Circuit, July 15, 1952], 198 F. 2d 376 (cert. den. 344 U. S. 896 — December 8, 1952), the Court in an action brought for a maritime tort on the law side of a Federal District Court held, as to the effect of contributory negligence that the maritime law rather than the local law governed and recognized that the *Riley* case, *supra,* would look to the maritime law to determine the effect of contributory negligence.

It is also significant that in the cases decided by the Court of Appeals for the Second Circuit dealing with longshoremen predicated on unseaworthiness, as distinguished from cases dealing with negligence, that very Circuit does not make a choice of New York law, as for example, *Mollica* v. *Compania Sud-Americana De Vapores,* 202 F. 2d 25, decided February 2, 1953 (cert. den. May 25, 1953—345 U. S. 965) and *Lauro* v. *United States,* 162 F. 2d 32.

In the light of the above confused situation, with reference to which law is applicable, expressed by this Court in *Standard Dredging Co.* v. *Murphy,* 319 U. S. 306, the fact that petitioner did not raise the question of what law governs upon the appeal herein, shrinks into insignificance against the necessity for authoritative final determination by this Court.

3. The doctrine that a ship owner's duty to a longshoreman to provide a seaworthy vessel is a concomitant of control is erroneously applied herein.

From the first point it is seen that the ship owner's liability here should have been imposed on the basis of the unseaworthiness of the equipment furnished by the longshoremen, and from the second point it is seen that had the Court of Appeals treated the within case in terms of seaworthiness, it would have applied Federal law. No consideration was given the problem of seaworthiness by the Court of Appeals. Its failure to do so is not explained by the stipulation of the parties as to seaworthiness. We are here concerned with stevedore's appliances rendering the vessel unseaworthy, and not ship's appliances rendering the vessel unseaworthy. There is no stipulation concerning stevedore's appliances—which were the gravamen of the dispute herein.

The relinquishment of control doctrine first appeared in the Second Circuit in *Grasso* v. *Lorentzen,* 149 F. 2d 127 (cert. den. 326 U. S. 743) which was decided before *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 was decided by this Court. To graft the qualification that the ship owner must retain control of the unseaworthy instrumentality that causes the injury, on to the doctrine of unseaworthiness

expressed in the *Sieracki* case, is contrary to this Court's expression in that case. There is no such qualification expressed in the *Sieracki* case, *supra,* and certainly, to that extent, the instant case conflicts with the *Sieracki* case. If longshoremen are to be assimilated to the position of seamen in so far as the ship owner's liability for injury aboard ship is concerned, as the *Sieracki* case holds they are, there is no warrant for cutting off the ship owner's liability at the point where he relinquishes control. To so cut off the ship owner's obligation is to qualify the "absolute duty owing to all within the range of its humanitarian policy" [*Seas Shipping Co.* v. *Sieracki, supra,* at p. 95].

We also submit that the relinquishment of control doctrine conflicts with the decision of this Court in *The Osceola,* 189 U. S. 158, wherein the Court says at page 175 that the ship owner is liable for injuries caused in consequence of the unseaworthiness of a vessel or a failure to supply and keep in order the proper appliances appurtenant to the ship. Again, this Court does not qualify the duty to provide a seaworthy vessel by a further requirement that the ship owner must retain control, or that the appliance must belong to the ship owner.

4. The Court's holding that although the ship owner had a general power to approve the equipment, he did not have the detailed control that would make him liable for the injury, conflicts in principle with the decision of the Court of Appeals for the Third Circuit in the case of *Brabazon* v. *Belships Co.,* 202 F. 2d 904, decided March 26, 1953. Assuming, arguendo, but not conceding, that the doctrine of unseaworthiness is inapplicable here, and that the ship was not rendered unseaworthy by the unseaworthy

gear furnished by the stevedore, but that the ship owner's liability was predicated on negligence, the decision is nevertheless erroneous in that it held as a matter of law that the ship owner herein had no duty of care to the stevedore with respect to the safety of the equipment.

In the *Brabazon* case, *supra,* the Court carefully pointed out that the ship owner's liability on the facts of the case could not be predicated on unseaworthiness or affirmative act of the ship owner. The Court said: "If chargeable at all, Belships must be held 'for some omission' during the loading operation."

The Court expressly rejected the argument there made (successful below in the instant case) that the vessel having been safe when stevedoring operations began, the ship owner had no affirmative duty for shipboard hazards not of his own creation that came into existence in the independent contractor's work area during the course of work.

The Court said at page 906:

> "• • • We do not accept so sweeping a generalization. The owner who retains control of the vessel as a whole and general supervision of what is being accomplished by an independent contractor in one part of the vessel is not relieved of all responsibility in connection with the prevention, discovery or correction of new hazards which may make the area temporarily used and occupied by independent contractors an unsafe place to work • • •."

In the instant case, the parties stipulated (R. 25) that except for the portions and appliances of the vessel which were operated by the stevedore for the purpose of unloading, the vessel was operated by the ship owner. The ship

owner also had, according to the Court of Appeals herein, a general power to approve the equipment to be used. Thus, the case falls within the holding of the *Brabazon* case that the ship owner who retains control of the vessel as a whole and general supervision of what is being accomplished by an independent contractor in one part of the vessel, is not relieved of all responsibility.

Also in the case of *Shields* v. *United States,* 175 F. 2d 743 [(Court of Appeals for the Third Circuit, decided May 24, 1949) (cert. den. 338 U. S. 899 — December 12, 1949)] the Court said (p. 744):

> " • • • We agree that the ship owner's responsibility to furnish a safe place for the crew continues through any hazard created by longshoremen in loading the cargo and engaged by the owner for that purpose. In this connection, as the district judge stated, the method employed by the stevedores in operating the deck winches, if considered by itself, might well be thought dangerous to Shields in his job. • • • "

We assimilate a longshoreman to the position of a seaman, in accordance with the following quotation from *Petterson* v. *Alaska S.S. Co.,* 205 F. 2d 478:

> "Judge Hand was correct in his interpretation of the Sieracki case as assimilating a longshoreman to the position of a seaman insofar as injuries received while on board ship are concerned. This is shown by the reference in the Sieracki opinion to the 'common core of policy which has been controlling' which is found running through the decisions permitting longshoremen to recover from shipowners 'that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled

to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner' * * * " (p. 480).

As a matter of general maritime law, therefore, and in the light of the *Brabazon* case, *supra,* as well as the *Shields* case, *supra,* the ship owner's duty to use reasonable care continued as a matter of law irrespective of contract, through any hazards created by the longshoremen.

The jury's verdict that the ship owner breached that duty should have been permitted to stand.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP F. DICOSTANZO
Attorney for Petitioner

LEVINE, BAKER & HEIBERGER,
JACK STEINMAN,
of Counsel.

October, 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 387.

JULIA GALLAGHER, as Administratrix of the Estate of JAMES GALLAGHER, deceased,

Petitioner,

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JULIA GALLAGHER,

Plaintiff,

v.

UNITED STATES LINES COMPANY,

Respondent,

v.

T. HOGAN & SONS, INC.

BRIEF OF UNITED STATES LINES COMPANY, RESPONDENT, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The petition herein, unless scrutinized with care, could serve as an enticement to the improvident grant of certiorari. Actually, questions which, it is said, deserve review by this court are not involved.

Briefly, petitioner claims that the Court of Appeals was wrong in holding that New York law was the substantive law applicable herein. According to petitioner's contention, if maritime law had been applied, United States Lines

Company,* the shipowner, would have been held liable. This liability, says the petitioner, would have arisen on either or both of the following grounds. In the first place, United's vessel would have been found to be the unseaworthy cause of the accident, because T. Hogan & Sons, Inc.,** which was plaintiff's independent contracting stevedore employer, chose to furnish and use improper stevedoring equipment in doing the work which it had contracted with United to do. In the second place, if maritime law had been applied, United would have been found to be the negligent cause of the accident in that it did not prevent Hogan from furnishing such equipment to its employees, and did not prevent Hogan's employees from using it.

It is obvious that, if petitioner's substantive rights, whatever their source, were fully protected in the Court of Appeals, it does not matter whether that court relied on New York law or maritime law to do so. Therefore, the initial question (and, in view of the answer which must be made thereto, the only question which need be considered in respect of this petition) is whether petitioner's substantive rights were fully protected.

A. As to Unseaworthiness.

Petitioner's substantive rights in respect of unseaworthiness were fully protected below because plaintiff agreed in both lower courts that the vessel was not unseaworthy in any respect, i. e., by reason of a defect either in the vessel's own appliances or in appliances furnished by the stevedore employer to his employees for their use. The plaintiff asked for the application of the New York law of

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* Hereinafter referred to as United.

** Hereinafter referred to as Hogan.

negligence and did not, at any time, ask for the application of any other law.

The parties—plaintiff, United, and Hogan—stipulated as follows: "No claim is made that there was ever anything unseaworthy, improper, or defective so far as concerns the vessel itself and its appliances" (27).*

The Court of Appeals took particular notice that this case did not involve unseaworthiness of any kind. That court said, in its opinion (154), "There was no claim that the vessel and its appliances were *in any way* unseaworthy or defective." (Emphasis ours.)

Therefore, when the petitioner says, at page 16 of the petition, "We are here concerned with stevedore's appliances rendering the vessel unseaworthy * * *", there is involved a departure from accuracy. The stipulation of no claim that there was "anything unseaworthy * * * so far as concerns the vessel itself * * *", was intended to and did eliminate from the case unseaworthiness of the vessel, regardless of what the source of the unseaworthiness might be thought to be.

This case was tried twice (3, 4). On the first trial, the jury disagreed (4). On the second trial, the jury answered specific questions (97, 98) and, on the basis of these answers, the District Court entered judgment against United (104). Each trial was conducted on the basis of a pre-trial order which contained a stipulation that "No claim is made that there was ever anything unseaworthy, improper, or defective so far as concerns the vessel itself and its appliances" (24, 27, 59, 11). After the first trial had occurred, and during the course of a pre-trial hearing

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* References to the Appendix to United's brief in the Court of Appeals are as follows: (1)

References to the typewritten record filed in the Court of Appeals are preceded by the letter (R).

which took place on January 19, 1953, as a preliminary to preparing and executing a second pre-trial order (R1B-R67B), everyone concerned with the case was well aware that liability, if any, depended on whether an airplane skid, which was the property of and which had been furnished and used by Hogan, was a proper appliance for the work which Hogan had undertaken to do. Accordingly, after referring to such use of the airplane skid in Hogan's stevedoring operation, the parties stipulated that the first issue to be decided was "Whether the equipment used was in fact unsafe and dangerous for the use to which it was put", i. e., by Hogan (30).

Therefore, when the parties stipulated in the same document that no claim was made that the vessel itself was unseaworthy (27), they meant, necessarily, that no claim was made that the vessel was unseaworthy by reason of the fact that the airplane skid (furnished and used by Hogan) was unsafe and dangerous.

Moreover, during the pre-trial hearing of January 19, 1953, at which the contents of the proposed second pre-trial order was discussed, the following colloquy took place (R. 65B):

> "The Court: All right, gentlemen. I am sorry. Before we leave, there is just one more question I want to ask plaintiff's counsel.
>
> Your liability is predicated on negligence as against the United States Lines?
>
> Mr. Levine: That's right, your Honor. We had urged unseaworthiness.
>
> The Court: The pre-trial seems to exclude that in no uncertain terms.
>
> Mr. Parmer: That is right.
>
> The Court: If I recall, the language runs to this effect. No claim is made that there was anything ever unseaworthy, improper, or defective so far as concerns the vessel itself and its appliances.

Mr. Levine: That is right.

The Court: So we are going to the jury on the question of negligence?

Mr. Levine: Well this case came up, and I should not argue it—he should. This came up, however, and it was urged at the first trial. Of course, it was not urged by me, because I do not know about this, that the method of discharge constituted unseaworthiness rather than the vessel or its appurtenances.

The Court: Gentlemen, let me make it very clear. I saw the feasibility of doing some of this pre-trial order work consistent with Judge Knox's instructions to me, but I do not think the question of seaworthiness is in here at all. I think it is a question of going to the jury on negligence. I think there is no room for modifying that at all. I just want that clear.

Mr. Steinman: May I just state, your Honor, that there was no deviation made or attempted to be made.

The Court: Then, let me put it this way. The issue of unseaworthiness is not incorporated.

Mr. Parmer: Thank you, your Honor.

Mr. Levine: Do not look so crestfallen. If during the trial evidence comes out which shows there is no deviation from the trial order, but permits argument on the order, the Court will entertain it.

The Court: If negligence and seaworthiness in your case are synonymous, but if you want unseaworthiness as a second string to your bow, that is something else.

Mr. Levine: It must arise out of the operation.

The Court: If you are using unseaworthiness as synonymous with negligence, that is one situation, but if you are going to use unseaworthiness

as a second cause of action, my thinking at this time is that I will not permit that.

Mr. Levine: All I was doing was consoling him."

The foregoing shows that, before proceeding with the second trial, both of the counsel for the plaintiff contemplated making a claim that the vessel was unseaworthy by reason of "the method of discharge" used by Hogan at the time of the accident. They contemplated making this claim notwithstanding that the stipulation which they also contemplated entering into as part of the second pre-trial order would clearly eliminate such a claim from the case. On being told in no uncertain terms by the trial judge that he would not permit such a distortion of the obvious meaning of the contemplated stipulation, the leading plaintiff's counsel, Mr. Levine, accepted the court's ruling without comment, except to note that his only remaining interest was to "console" his "crestfallen" assistant counsel, Mr. Steinman, who, according to Mr. Levine, had been responsible in the first place for the notion that one could "urge" both the inclusion and exclusion of a claim that a vessel was unseaworthy in the same case at the same time. *Thereafter,* on January 23, 1953, the pre-trial order, including the stipulation as to absence of unseaworthiness, was agreed to and signed (31).

The Court of Appeals for the Second Circuit has held that the issues as set forth in a pre-trial order are the only issues involved on a trial, in the absence of amendment. This court denied certiorari. *Fernandez* v. *United Fruit Co.,* 200 F. 2d 414, cert. den. 345 U. S. 935.

The case was tried as a negligence case solely. The only claim which the plaintiff made against United was that it was liable because it had not supervised Hogan's work and had not prevented Hogan from using its own airplane skid (42, 43), which was admittedly good for dis-

charge of some of the cargo, but, which was claimed to be dangerous for the discharge of the particular bales of scrap rope which fell from it and struck the plaintiff (32, 33, 38, 39, 40, 46). The plaintiff asked the court to charge the jury on negligence only (42, 43). The jury was asked to answer, and did answer, questions which were related to negligence only (97, 98). Moreover, in the Court of Appeals, the plaintiff urged that the judgment, entered by the District Court on the answers of the jury, be sustained solely on the ground of New York negligence law. Thus, the plaintiff said, on page 7 of his brief in the Court of Appeals:

> "We take the law to be that the shipowner owes a business invitee the duty to provide a reasonably safe place and reasonably safe conditions under which to work, and that the measure of care due to a business guest is the same as that due from an employer to an employee under the law of the State of New York, where the ship was moored when the accident happened.
>
> *Guerrini* v. *United States*, 167 F. 2d 352;
> *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d 257;
> *Miller* v. *The Sultana*, 176 F. 2d 203."

The only apparent reason for petitioner's making a claim in this court (and for the first time anywhere) that United was liable because its vessel became unseaworthy solely by reason of Hogan's activities, is that, on June 19, 1953, which was after the case at bar had been argued in the Court of Appeals for the Second Circuit, the Court of Appeals for the Ninth Circuit handed down its decision in *Petterson* v. *Alaska S.S. Co. Inc.*, 205 F. 2d 478. The case at bar was argued on June 4, 1953. The decision in the *Petterson* case is dated June 19, 1953. But, it was not published in the Federal Reporter until the issue of September 7, 1953.

There is no record that the *Petterson* case was ever called to the attention of the Court of Appeals for the Second Circuit before it handed down its decision in the case at bar on July 6, 1953. Therefore, it is safe to say that the *Petterson* case did not come to the attention of the attorneys for the petitioner until some time after it was published in the Federal Reporter on or about September 7, 1953.

By reason of the foregoing, certain statements in the petition carry an unfair imputation of delinquency on the part of the Court of Appeals for the Second Circuit. We refer to the following:

> p. 12. "There is no consideration whatever given in the opinion in the instant case to the question of whether the vessel was rendered unseaworthy by reason of the stevedore's bringing aboard and using equipment not reasonably fit for the purpose to which it was put to use."

> p. 16. "No consideration was given the problem of seaworthiness by the Court of Appeals. Its failure to do so is not explained by the stipulation of the parties as to seaworthiness. We are here concerned with stevedore's appliances rendering the vessel unseaworthy, and not ship's appliances rendering the vessel unseaworthy. There is no stipulation concerning stevedore's appliances—which were the gravamen of the dispute herein."

The undeniable fact is that all of the parties stipulated unseaworthiness out of the case for all purposes, tried the case on the basis of a claim of negligence only, and argued the appeal on the basis of negligence only. In view of this, how can the petitioner, in good conscience, blame the Court of Appeals for dealing with the case on a negligence basis, which was the way requested by all of the parties!

As to Negligence.

Petitioner's substantive rights, if any, to recover for negligence under the maritime law were also fully protected below. No claim was made, either in the District Court or in the Court of Appeals, that plaintiff had a substantive right to recover for negligence under the maritime law which he wished to have enforced in preference to a similar right under the law of New York. Indeed, as the quotation from petitioner's brief in the Court of Appeals pointedly shows, (see p. 7 of this brief), petitioner asked for the application of the New York common law of negligence exclusively.

In the Court of Appeals for the Second Circuit, the choice as between common law and maritime principles proceeds as follows: where the right is one which is "peculiar" to the maritime law, the maritime law governs whether the case be brought in admiralty or at law. On the other hand, where admiralty, in order to enforce any law at all, must borrow by analogy from the common law, it is the common law of the state in which the accident happened which governs. As the Court of Appeals said in *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d, 257, cert. den. 342 U. S. 918, at 261: "Those rights the maritime law (right of a business invitee to recover from an occupier of premises) has taken by analogy from the common law." It was such a right, arising either directly (as some believe) from New York law, or indirectly by reason of admiralty's borrowing it from New York law, that plaintiff asserted against United both in the District Court and in the Court of Appeals. Moreover, as the quotation from petitioner's brief shows, petitioner relied specifically on the *Spaulding* case.

The decision below was merely that plaintiff was wrong in his contention as to what New York law was. Plaintiff erroneously attempted to push New York law to a point beyond the bounds legitimately determined by the New York Court of Appeals. Petitioner conceded, in substance, that United did not have any control of that part of the vessel where Hogan was carrying on its operation and did not have, therefore, the resulting familiar common law duty, in the exercise of reasonable care, to give Hogan's employees a safe place in which to work. Nevertheless, by reason of United's contractual right to approve Hogan's appliances, petitioner contended that United had a common law duty to intervene in Hogan's work and, by exercising sufficient supervision for the purpose, to prevent Hogan from using its own airplane skid when it was dangerous to use it in connection with particular portions of the cargo. Thus, in the hold of this ship, there were actually different types of cargo. Some items of cargo could be discharged by means of an airplane skid without risk of injury. Other items of cargo involved risk of injury to longshoremen if an airplane skid were used. The intervention required of United, according to the plaintiff's contention, was to have someone present in each hatch of the vessel in order to see to it that the longshoremen did not use an airplane skid for the discharge of those items of cargo for which it was not suited (44-46).

It was a judgment based on such a misguided conception of the common law of New York, (and for that matter, the common law of other states), which the Court of Appeals had to deal with. The Court of Appeals had no choice except to reverse the judgment unless it wished to indulge in the doubtful business of remaking the common law of New York, or, in disregard of the antithetical concepts

involved, to declare a maritime law which was, at once, new and "peculiar". A request for such extraordinary action was not made in the Court of Appeals. But, now in this court, under a pretense of requesting the application of maritime law, instead of common law, petitioner, insofar as she asserts that the plaintiff should be permitted to recover for alleged negligence, is asking for exactly that.

This is not a case where this Court is asked to review questions which might have been involved below, but which, through inadvertence, were not raised in the briefs. On the contrary, the petitioner is asking this Court to review questions which were not involved below, because the parties, as the record shows, consciously intended to exclude such questions.

This may be put more pointedly by asking what would the petitioner have this court do if it should first consider and then determine the supposed legal questions sought to be reviewed. The judgment rendered below was rendered in the light of answers by a jury to questions respecting United's supposed negligence under the law of New York (107). There has been no finding that the vessel was unseaworthy. Likewise, there has been no finding that United had such control, as an occupier, of the place of the accident as to result in its having affirmative duties. Moreover, as will be seen, in view of the stipulation made by the parties, such a finding could not have been made. Is it, then, the petitioner's request that this court should now either determine that an otherwise sound vessel can become unseaworthy by reason of the presence thereon of a stevedore's appliance which can become dangerous only in the event of its transient use in connection with a discharge operation to which it is not suited, or, in respect of negligence, should discover a novel principle of maritime law related to that subject, and, should, thereupon, direct

that the case be re-tried for the third time on theories of law not previously advanced nor known to exist!

Petitioner's reliance on the case of *Brabazon* v. *Belships Co. Limited, Skibs A/S,* 202 F. 2d 904 (petition, p. 17) is ill advised. No doubt, as that case intimates, a shipowner who retains control of a vessel as a whole and, also, general supervision of an independent contractor's work thereon, may have duties resulting from the fact of such control and general supervision. Here, however, the parties stipulated that those portions and appliances of the vessel which were necessary for the discharge of cargo, i.e., those portions of the vessel and its appliances involved in the accident to the plaintiff, were operated by Hogan and were not operated by United (25). The parties also stipulated that United did not supervise Hogan in the performance of any of its stevedoring activities but relied on Hogan for the proper performance of Hogan's work in all its details (26).

At the first trial, District Judge Weinfeld, on the basis of the foregoing stipulations, charged the jury that United had surrendered physical control over the area where Hogan and its employees were engaged in loading the vessel, (see p. 567 of the proceedings of the first trial of this case [59]). The petitioner did not object to such a charge. On the second trial, District Judge Edelstein's position was the same. Although he saw no need of emphasizing it in his charge, Judge Edelstein said that he thought it was "not incorrect" to charge that "This is not a case involving a safe place in which to work" (48).

The petitioner's reference to conflict between the decision of the Court of Appeals for the Ninth Circuit in *Petterson* v. *Alaska S.S. Co. Inc.,* 205 F. 2d 478 and decisions of the Court of Appeals for the Second Circuit, such as *Grasso* v. *Lorentzen,* 149 F. 2d 127, is ill advised. The conflict referred to by the petitioner does not exist. At present,

there is merely a possibility that conflict will arise in the future when, as, and if, a case should come to the Court of Appeals for the Second Circuit, where an injured longshoreman, all else failing, is reduced to the necessity of claiming, in reliance on the *Petterson* case, that a vessel is unseaworthy merely because a stevedore employer has furnished to his employees a defective stevedoring appliance. Up to now, there has been no such decision in the Second Circuit. Indeed, such a contention has not been made.

The actual conflict between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Second Circuit is not in respect of their decisions. It is in respect of their basic approach to the problem of what constitutes liability for an unseaworthy vessel. On the one hand, the Court of Appeals for the Second Circuit, in dealing with cases where the shipowner had originally furnished a good appliance, which, subsequently, while in the hands of longshoremen, became defective, (the case at bar is not such a case), has held that the vessel did not become liable for unseaworthiness by reason of events occurring after the ship's appliance was out of the shipowner's control. On the other hand, the Court of Appeals for the Ninth Circuit has rejected this factor of control of the ship's appliance by the shipowner as a determinant of liability for unseaworthiness on the ground that such control is relevant only in determining whether a shipowner has been negligent. From this premise, which, as will be shown, is erroneous, the Court of Appeals for the Ninth Circuit has drawn the conclusion that the mere existence of a defective appliance on or about a vessel, will make the shipowner liable, as for an unseaworthy vessel, regardless of, and even in the absence of, any other connection between the dangerous appliance and the vessel and its owner.

Notwithstanding the opinion of the Court of Appeals for the Ninth Circuit to the contrary, control of a ship's appliance by a shipowner is relevant, not only to the shipowner's liability for negligence, but also to his liability for unseaworthiness. However, the relevance of such control is not the same in each case. With respect to negligence, control is relevant because a duty to use care presupposes an ability to use it. With respect to unseaworthiness, control is relevant because liability for unseaworthiness is derived from the fact that the shipowner has furnished an appliance for the seaman's or longshoreman's use. If, therefore, the appliance is in good condition when it is originally furnished by the shipowner for use, but subsequently, while in the hands of longshoremen, becomes unseaworthy, it cannot be said to be furnished by the shipowner for use at the time that it becomes unseaworthy, because it is out of the shipowner's control at that time. It is in this sense that the Court of Appeals for the Second Circuit refers to the factor of control as relevant to a shipowner's liability for unseaworthiness.

In *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 100, the Supreme Court said:

> "But later cases in this and other federal courts have followed the ruling of *The Osceola, supra,* that the exercise of due diligence does not relieve the owner of his obligation to the seaman to *furnish* adequate appliances. *Carlisle Packing Co.* v. *Sandanger, supra,* 259-260; *The Arizona* v. *Anelich, supra,* 120 *et seq.; Beadle* v. *Spencer,* 298, U. S. 124, 128-129; *Socony-Vacuum Co.* v. *Smith, supra,* 428-429, 432; *The H. A. Scandrett,* 87 F. 2d 708, 710-711; *cf. The Edwin I. Morrison,* 153 U. S. 199, 210.
>
> If the owner is liable for *furnishing* an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that

> the negligence of the officers of the vessel contributed to its unseaworthiness. It is true that before the Jones Act the owner was, in other respects, not responsible for injuries to a seaman caused by the negligence of officers or members of the crew. But this is not sufficient to insulate the owner from liability for their negligent failure to furnish seaworthy appliances, see Judge Addison Brown, in *The Frank and Willie, supra,* 495-497; *Carlisle Packing Co.* v. *Sandanger, supra,* 259-260 more than their negligence relieves him from his liability for maintenance and cure. *The Osceola, supra,* 175; *Pacific S.S. Co.* v. *Peterson, supra,* 134; *Calmar S.S. Corp.* v. *Taylor,* 303 U. S. 525, 527."

In a seaman's case, all of the vessel's appliances are, ordinarily, furnished to the seaman for use, not only at the beginning of a voyage, but, also, for its duration. During the entire voyage they are under the shipowner's control. In the case of a longshoreman, however, ship's appliances are furnished by the shipowner only when turned over by the shipowner to the stevedore-employer for use by his employees. Thereafter, they are furnished to the longshoremen by the stevedore-employer, who then controls them and, by reason of that fact, is the only one who can determine when to withdraw them from use.

Appropriate to the foregoing are those decisions which hold that a shipowner is not liable, even in respect of unseaworthiness, where the injury is caused by a defective condition on board ship which an employee or his employer has undertaken to eliminate or repair. *Bruszewski* v. *Isthmian Steamship Company,* 163 F. 2d 720; cert. den. 333 U. S. 828; *Byars* v. *Moore-McCormack Lines Inc.,* 155 F. 2d 587; *Walker* v. *Lykes Bros. S.S. Co. Inc.,* 193 F. 2d 772. See also *Kowalsky* v. *Conreco Company,* 264 N. Y. 125 and *John Peikel* v. *Grace Line, Inc.,* 300 N. Y. 701. In such cases, the

defective appliance, or object of which complaint was made, was not furnished for use. It was a subject of repair or of a duty to repair. It would be a logical absurdity to hold a shipowner liable for unseaworthiness in such a case. *Bruszewski* v. *Isthmian Steamship Company*, 163 F. 2d 720, 722. And yet, the *Petterson* case, in its rationale, would require it.

The foregoing considerations, which, actually, are pertinent only to the question of whether the decision in the *Petterson* case should be reviewed by this court, are submitted for the purpose of showing that the point involved in the *Petterson* case is not involved in the case at bar. The important conflict, which this court might well consider, when the occasion arises, is the conflict between the decision in the *Petterson* case and the rationale of the decisions in the Supreme Court and in the Court of Appeals for the Second Circuit, which faithfully reflect the decisions of the Supreme Court. As between the case at bar and the *Petterson* case, there is not a conflict between the two circuits even in respect of rationale of decision. That is because the plaintiff in the Court of Appeals, as already explained, consciously eliminated all possibility of such conflict from the case by claiming solely that his right to recover was for negligence under the law of New York.

The petition should be denied.

Respectfully submitted,

RAYMOND PARMER,
VERNON SIMS JONES,
Counsel for Respondent United States Lines Company.

FILED
NOV 5 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 387....

JULIA GALLAGHER, as Administratrix of the Estate of JAMES GALLAGHER, deceased,

Petitioner,

and

JULIA GALLAGHER,

Plaintiff,

v.

UNITED STATES LINES COMPANY,

Respondent,

v.

T. HOGAN & SONS, INC.,

Respondent.

BRIEF OF RESPONDENT T. HOGAN & SONS, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH WALKER,
Counsel for Respondent,
T. Hogan & Sons, Inc.

FRANK A. FRITZ,
JOHN B. FORREST,
Of Counsel.

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Statement

The sole question before the Court of Appeals was whether, by its contract with respondent T. Hogan & Sons, Inc.* respondent United States Lines Company** reserved

* Hereinafter referred to as Hogan.

** Hereinafter referred to as United.

to itself such power of control as to render United liable in negligence for injuries to the deceased by reason of United's failure to discover and prevent the use by Hogan, of stevedoring equipment improper for unloading bales of scrap rope. (R. 52A)* (30)**

The facts with respect to this action are set forth in the stipulation of the parties (24-31).

The clause which was considered by both the Trial Court and the Court of Appeals in determining whether or not United had reserved a power of control which would create the liability claimed by plaintiff appears as part of Clause 11(a) of the contract:

> "The Contractor performing any service required by this contract shall use such equipment approved by the Owner as is best adapted for the proper and safe handling of the cargo, passenger baggage, and mail; and shall be responsible for any and all loss or damage to cargo or other property, including coopering or repairing packages damaged, while handling or stowing same, when occurring through the negligence or fault of the Contractor, his employees and servants. If such coopering or repairing is done by the Owner's employees, the Contractor shall reimburse the Owner to the extent of the actual cost of such work." (120-121)

The liability of United rested entirely on the interpretation of this clause by the Court below.

The Court of Appeals, in arriving at its decision, quoted in part the charge of Judge Edelstein to the Jury:

> "As a result of this reserved contractual power * * * the United States Lines had a duty toward the

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* References to filed record are as follows: (R1).

** References to Appendix before Court of Appeals of Respondent, United, are as follows: (1).

plaintiff Gallagher to exercise reasonable care for his safety in seeing to it that the equipment used by T. Hogan was safe and proper for the use to which it was put." (R. 767)

Pertinent parts of the charge of Judge Edelstein with respect to his interpretation of the contract between United and Hogan follow:

"I have ruled as a matter of law that by reserving to itself such power of approval of the equipment, the United States Lines had the power to require Hogan to use proper equipment for the safe handling of the cargo, and, if it were so minded, could direct them to refrain from using the airplane skid in the event it decided that such a skid was not a proper and safe way for the handling of the cargo. As a result of this reserved contractual power, I charge you that the United States Lines had a duty toward the plaintiff Gallagher to exercise reasonable care for his safety in seeing to it that the equipment used by T. Hogan was safe and proper for the use to which it was put. The fact that Hogan, as Gallagher's employer, was under a duty to provide him with a reasonably safe place to work does not relieve the United States Lines of its duty to Gallagher." (R. 767)

* * * *

"But if you do find that the airplane skid was unsafe for the purpose of its intended use, then you must consider a second question. Was the defendant United States Lines negligent in failing to disapprove and prevent the use of such equipment by Hogan?" (R. 771)

"The plaintiff contends that the United States Lines was negligent in failing to disapprove of and prevent the use by Hogan of the airplane skid for the purpose of hoisting the baled scrap rope from the hold; the

plaintiff contends that they were negligent in permitting the use and in not requiring Hogan to use other equipment better adapted for the proper and safe handling of the cargo; because, it is urged, they knew that baled scrap rope was to be discharged, and they also knew or in the exercise of reasonable care, in view of past experiences, should have known that Hogan would use airplane skids for the job." (R. 772)

No exception to this charge was taken by the plaintiff. Indeed, it followed closely the proposed charge of the plaintiff with respect to plaintiff's claim of liability (R. 635, 636).

The lower Court did not charge with respect to unseaworthiness, nor to the application of Maritime Law. No request of the Court to do so was made by plaintiff at any time (R. 635-638).

The stipulation between the parties contains the following paragraph:

> "No claim is made that there was ever anything unseaworthy, improper, or defective so far as concerns the vessel itself and its appliances." (27)

This was the formal stipulation of the parties upon which pre-trial orders were entered, not only for purposes of the trial before Judge Edelstein but likewise for the first trial before Judge Weinfeld which resulted in a disagreement.

Upon the second trial of the action the Court submitted eight questions to the Jury to guide them in reaching a verdict. The two questions which are pertinent to the petition herein read:

> "1. Was the airplane skid a reasonable safe piece of equipment for the purpose of unloading the baled scrap rope in this case from the hold of the ship to the loft of Pier 60?

"2. If the answer to No. 1 is no, did the failure of the defendant, United States Lines to disapprove and prevent the use of that equipment by Hogan constitute a failure by the United States Lines to exercise reasonable care in the circumstances?" (R. 52A)

Plaintiff took no exception to the submission of these questions nor did plaintiff request that any questions regarding unseaworthiness be submitted to the Jury.

In an unanimous opinion the Court of Appeals reversed the judgment of the Court below, dismissed the complaint against the defendant United, and dismissed the third-party complaint against Hogan.

Argument

In the first specification of error petitioner complains that the Court below failed to hold that the vessel was unseaworthy and that United was liable for injuries occurring due to such unseaworthiness.

Petitioner endeavors to avoid the consequence of the stipulation eliminating unseaworthiness from the case by suggesting that unseaworthiness must be based upon defective equipment owned and operated by Hogan. It is difficult to see how unseaworthiness of the vessel may be eliminated from the case by stipulation, and restored to the case for the first time on petition to the Supreme Court by a claim of intent not to have eliminated from such theory the equipment of the stevedore without any reference to the vessel.

The case was tried before Judge Edelstein exclusively on the theory of negligence at the specific request of petitioner. The question was whether United failed to discover the improper equipment and prevent the use thereof by Hogan (R. 774). The question of whether the equipment used by Hogan was improper was limited to

the particular stevedoring operation in which Hogan was engaged at the time of the alleged accident (R. 770).

The record of the pre-trial conference between the attorneys and Judge Edelstein immedately prior to trial emphasizes the position taken by petitioner on the trial of the action. The pertinent parts of such colloquy are as follows:

> "The Court: All right, gentlemen. I am sorry. Before we leave, there is just one more question I want to ask plaintiff's counsel.
>
> The Court: Your liability is predicated on negligence as against the United States Lines?
>
> Mr. Levine: That's right, your Honor. We had urged unseaworthiness.
>
> The Court: The pretrial seems to exclude that in no uncertain terms.
>
> Mr. Parmer: That is right.
>
> The Court: If I recall, the language runs to this effect. No claim is made that there was anything ever unseaworthy, improper, or defective so far as concerns the vessel itself and its appliances.
>
> Mr. Levine: That is right.
>
> The Court: So we are going to the jury on the question of negligence?
>
> Mr. Levine: Well, this came up, and I should not argue it—he should. This came up, however, and it was urged at the first trial. Of course, it was not urged by me, because I do not know about this, that a method of discharge constituted unseaworthiness rather than the vessel or its appurtenances.
>
> The Court: Gentlemen, let me make it very clear. I saw the feasibility of doing some of this pretrial —order work, consistent with Judge Knox's instructions to me, but I do not think the question of seaworthiness is in here at all. I think it is a question of going to the jury on negligence. I think there is no

room here for modifying that at all. I just want that clear.

Mr. Steinman: May I just state, Your Honor, that there was no deviation made, or attempt to be made.

The Court: Then let me put it this way. The issue of unseaworthiness is not incorporated." (R. 65B-66B)

To this interpretation of the theory upon which petitioner was to try its case, petitioner unhesitatingly agreed (R. 67B).

In the Court of Appeals, petitioner reaffirmed his position by urging that the liability of United was based on negligence. No mention of unseaworthiness was made by petitioner in his briefs.

For example, petitioner declared in his brief before the Court of Appeals, at page 9 thereof:

> "The plaintiff-appellee does not contend that United owed a duty to him as broad in all respects as the initial duty referred to in the *Mollica* case, *supra*. Nor does the appellee contend that United owed him a duty as found in all respects as that owned by an employer to an employee under the law of the State of New York. Appellee does contend that United owed him a duty to use reasonable care with respect to the selection of equipment, over which the ship-owner had reserved a power of approval. We feel we can do no better in expressing the nature of the duty which we contend United owed Gallagher than to quote Judge Weinfeld. Judge Weinfeld stated in his charge, not that defendant owed the plaintiff the duty to exercise reasonable care to provide him a safe place wherein to work, but merely 'With respect to the equipment supplied by Hogan in the unloading of the cargo, the defendant's duty toward the plaintiff was

to exercise reasonable care to provide for his safety' (Steno's Minutes, First Trial, 567; See Exhibit to Plaintiff-Appellant's Brief.)."

And again, at pages 21 and 22:

"We next consider United's exception to the Court's charge as to the negligence of the United States Lines. We respectfully submit that such portions of the charge which we have hereinabove set forth in dealing with United's third alleged error also dispose of the merits of United's contention as to error in the Judge's charge as to the degree of care to which United was held.

"It must be remembered that in addition to so much of the charge as appears on page 48 of Appellant's brief, the Court charged, *inter alia* (Appellant's Appendix, p. 74), that United's negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. The jury was further told that negligence was the failure to use ordinary care in the management of one's property or person. In addition, the jury was told that the person whose conduct was set up as a standard is not the extraordinarily cautious individual nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. We do not know of any other definition of the degree of care required of a defendant in an action for negligence than the Court below stated when it said that it means 'the degree of care that ordinarily prudent persons in like circumstances would exert' (Appellant's Appendix, p. 74)."

Thus, throughout the trial in the District Court, and upon appeal to the Court of Appeals, the plaintiff un-

waveringly held to the exclusive position that the liability of United, and the only liability of United, arose from its negligence in failing to discover and prevent the use of improper equipment owned by the stevedore Hogan.

Now, for the first time, and obviously because the interpretation of a contract by the Court below is insufficient grounds for the allowance of certiorari by the Supreme Court, the petitioner seeks to urge a theory which was formally and expressly stipulated out of the case before trial (27). Petitioner seeks review of a question which by his voluntary act has never been adjudicated in the courts below.

It is worthy of note that the case of *Petterson* v. *Alaska C. C. Co.*, 205 Fed. (2d) 478, was not decided by the Court of Appeals for the 9th Circuit until after the argument before the Court for the 2nd Circuit in the case at bar.

It is apparent that the theory which petitioner is now urging did not, and could not, have been in mind at the time of the trial or the argument before the Court of Appeals, since there was no case at that time upholding such a theory. In any event there is no conflict in the two decisions. The Court of Appeals for the 2nd Circuit in the matter at bar reviewed a case in which the theory relied on in the *Peterson* case was disclaimed and not litigated.

As to the second specification of error raised in the petitioner's brief, petitioner again asserts a theory not previously introduced in the case and at variance with that claimed. The petition now (p. 14) suggests that the Court of Appeals for the 2nd Circuit should have decided the question of liability on the part of United on some unexplained principle of Admiralty Law. Petitioner's brief in the Court of Appeals reads (p. 7):

> "We take the law to be that the shipowner owes a business invitee the duty to provide a reasonably safe place and reasonably safe conditions under which to

work, and that the measure of care due to a business guest is the same as that due from an employer to an employee under the law of the State of New York, where the ship was moored when the accident happened."

Guerrini v. *United States,* 167 Fed. 2d 352;
Spaulding v. *Parry Nav. Co.,* 187 Fed. 2d 257;
Miller v. *The Sultana,* 176 Fed. 2d 203.

"From the *Guerrini* case, *supra,* and *Miller* v. *Sultana, supra,* it appears that the duty extends beyond merely warning the guest of any dangers, and comprehends an affirmative duty to use reasonable care to provide for the guest's safety."

Thus it is not a situation (as the petitioner suggests, p. 16), where petitioner did not raise the question in the lower courts as to what law applied. He affirmatively contended for the application of the law of the State of New York.

The third specification of error, to the effect that the question of control should not have been a determining factor, is a direct reversal of petitioner's position below.

In his brief before the Court of Appeals he specifically accepts this determination when he states at page 7:

"We recognize that the shipowner's duty to a business guest extends up to the time that the independent contractor assumes control, and that the shipowner is not liable for an unsafe condition created by the independent contractor after the surrender of control."

Lauro v. *United States,* 162 Fed. 2d 32;
Grasso v. *Lorentzen,* 149 Fed. 2d 127.

"Control thus becomes of critical significance. We contend, in brief, that the shipowner herein did not even surrender control of the selection of equipment involved in this accident."

The petitioner now seeks to abandon this position and to rely upon the claim of unseaworthiness, an element deliberately excised from the case by the petitioner.

Under these circumstances there is nothing presented by these specifications of error for review by this Court.

> *Badger* v. *Ranlett,* 106 U. S. 255, 259-260;
> *Saltonstall* v. *Birtwell,* 164 U. S. 54, 70;
> *Sonvinsky* v. *United States,* 300 U. S. 506, 514;
> *Owens* v. *Union Pacific R. Co.,* 319 U. S. 715, 724-725.

With respect to the fourth specification of error, petitioner has removed from its context a quotation in the case of *Brabazon* v. *Belships Co.,* 202 Fed. 2d, 904-906, which would lead one to believe that a shipowner is responsible for the prevention, discovery or correction of all new hazards which might make an area temporarily used by an independent contractor an unsafe place to work. Such was not the case.

In that case the Court found that the judgment in favor of the plaintiff could be affirmed upon the actual negligence of the shipowner since it had failed to supply the necessary lighting that it had been asked to supply.

The Court stated at pages 909 and 910:

> "Without adverting to these difficulties the District Court found in rather general terms that the defendant was derelict in failure to perform its nondelegable duty 'to furnish libellant with a safe place to work.' Apparently the provision of a 'safe place to work' was viewed as an absolute requirement rather than a rule of reason. Inflexible statements of the duty to appear from time to time in judicial opinions, but we think such statements are misleading and should be disregarded. As we already have pointed out, each case

requires a separate determination whether the particular conduct of the shipowner fell short of reasonable care in the given circumstances."

At page 908 the Court said:

"Finally, it is clear on the record that the inadequacy of the board which broke to support a man's weight would have been apparent but for the darkness. Light would have made the danger obvious and would have enabled the workman to avoid it. Accordingly, we conclude that the negligent failure of the ship to supply needed light was a responsible cause of Brabazon's injury and that the judgment of the District Court meets support on that basis."

Since it was specifically found in the *Brabazon* case, *supra,* that the shipowner was liable for not furnishing proper lighting while it had control, even though asked to do so, it would scarcely seem to stand for the proposition urged by petitioner when taking into consideration the questions to be determined by the Trial Court in the case at bar.

The statement taken by the petitioner from *Shields* v. *United States,* 175 Fed. 2d 743, at page 19, was unnecessary to the decision of that case, since the Court held that negligence of the libellant was the cause of the accident and that the ship did not fail in its duty to supply a safe place to work.

That case has been cited for the proposition, only, that where a shipowner had not surrendered control of the ship it was his duty to provide the foreman with a safe place to work. (See *Hawn* v. *Pope Ensign Talbot, Inc.,* 198 Fed. 2d 800, 803.)

The question presented by this specification of error depends entirely upon the facts stipulated in the Trial

Court, and the interpretation of the Trial Court and the Court of Appeals of the contract between United and Hogan.

Eliminating from the petition those specifications of error relating to matters purposely stipulated out of the case, and those upon which petitioner took a diametrically opposed view in the Courts below, the petitioner is left only with the question of the correctness of the Court of Appeals' interpretation of the stevedore's contract. It can hardly be said that this is one of general importance. It applies only to an arrangement between an individual shipowner and a contracting stevedore.

The petition does not present a question, reviewable by this Court, of such peculiar or general importance as to justify this Court in issuing a writ of certiorari.

It is submitted that the petition should be denied.

JOSEPH WALKER,
Counsel for Respondent,
T. Hogan & Sons, Inc.

FRANK A. FRITZ,
JOHN B. FORREST,
of Counsel.

FILED
DEC 14 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1953

No. 387

JULIA GALLAGHER, as Administratrix of the Estate of JAMES GALLAGHER, deceased,

Petitioner,

and

JULIA GALLAGHER,

Plaintiff,

v.

UNITED STATES LINES COMPANY,

Respondent,

v.

T. HOGAN & SONS, INC.

PETITION FOR REARGUMENT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

WILLIAM W. HEIBERGER,
HARVEY GOLDSTEIN,
of Counsel.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y., BEEKMAN 3-2320
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PETITION FOR REARGUMENT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Julia Gallagher, as Administratrix of the Estate of James Gallagher, deceased, petitions this Honorable Court and respectfully requests a rehearing of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, which petition for said writ was denied by this Court on the 30th day of November, 1953.

The Reason for Petition for Reargument

The Supreme Court of the United States, on the 7th day of December, 1953, annunciated the proposition of law that in an Admiralty proceeding, maritime, and not state law, would govern. The case involved was *Hawn* v. *Pope and Talbot Inc.* which was an appeal to the Supreme Court of the United States from the decision of the United States Court of Appeals Third Circuit cited as 198 F. 2nd 800.

The decision by the Supreme Court of the United States having come down on December 7th, 1953 was obviously not available as support for the petition for a writ of certiorari herein, which was denied a few days theretofore. The decision in the case at bar was predicated exclusively on New York State law and denied to petitioner any rights under Admiralty law such as were granted to Charles Hawn by this Court a few days after the same rights were extinguished and denied to petitioner by the denial of the petition for a writ of certiorari herein. In view of the fact that this Court has granted the right to Charles Hawn to sustain a recovery in his favor on the basis of Admiralty law, petitioner respectfully asks that she be given the same rights.

POINT I

The Court below held that the law of New York governed and not Admiralty law.

The Court below stated in its opinion, 206 F. 2nd 177, at page 179:

> "The only basis under the law of New York (which governs, since the accident occurred within that State), for finding a duty on the part of United toward Gallagher is the reservation of the power to approve the equipment that Hogan used. Where

power is reserved by one who has hired an independent contractor to direct or control the contractor, an affirmative duty arises to exercise that power with reasonable care. Restatement, Torts § 414. The duty is necessarily co-extensive with the power. Thus, a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work, e. g., Uppington v. City of New York, 165 N. Y. 222, 223-235, 59 N. E. 91, 53 L. R. A. 550. Gucciardi v. Chisholm, 2 Cir., 145 F. 2d 514, 515. The hirer 'must have the power to control the manner of performing the very work in which the carelessness occurred.'' Vogel v. Mayor of City of New York, 92 N. Y. 10, 18, 44 Am. Rep. 349. Viewed in perhaps another way, United owed a duty to Gallagher, a business visitor, but this duty did not extend to conditions and activities over which United had no control. Lauro v. United States, 2 Cir., 162 F. 2d 32; Mollica v. Compania Sud-Americana de Vapores, 2 Cir., 202 F. 2d 25.''

After denying petition of certiorari in the case at bar, this Court stated in the *Hawn* case, *supra,* in unequivocal language, that the law as stated by the Court below in the instant case was not only incorrect but unjust.

The decision of December 7, 1953, in the *Hawn* case, *supra,* guaranteed to suitors involved in maritime torts the protection of both substantial and procedural Federal Law. This was denied to petitioner by the Court below. Such relief having been granted to Charles Hawn in the *Hawn* case, *supra,* it is respectfully submitted that petitioner be given the same relief.

POINT II

The Court below having held that the District Court was incorrect in its interpretation of the stevedoring contract in question as establishing a duty of the shipowner, the Court below was in error in not remanding the case to the District Court.

The Court below should have remanded the case to the District Court to take further testimony as to the construction placed on the contract in the trade when it determined that the contract presented questions of fact. This Court in the case of *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, 67 S. Ct. 847, 91 L. E. 1011, found the stevedoring contract could not be determined as a matter of law and therefore required its remission to the District Court to take further testimony as to the meaning, in the trade, of said contract.

The contract involved in the case at bar was a stevedoring contract between the shipowner and an independent stevedoring company.

Counsel for each of the parties agreed that the terms of the contract were unambiguous and that its meaning should be decided as a matter of law.

On appeal the Court below erroneously held that the terms of the contract presented issues of fact.

The Court below having determined [whether correctly or incorrectly] that issues of fact were involved, then it was error for the Court below to fail to follow the procedure directed by this Court in the *Porello* case, *supra.*

The Court of Appeals for the Second Circuit was in error when it failed to give petitioner an opportunity to present factual proof in the District Court after it overruled the stipulation of counsel to the effect that the contract did not present issues of fact.

POINT III

The English law should be incorporated into Admiralty Law in order to keep abreast of modern advances in civilization.

The late Chief Justice Vinson, when he introduced the Right Honorable Lord Simonds, the Lord High Chancellor of Great Britain, at the Annual Dinner of the American Bar Association at Boston last August, stated, "All of us know that England and America share a common heritage of freedom running back to the Magna Charta and beyond." He further stated, "Lawyers really need no reminder of this. American lawyers know that the legal guarantees by which we maintain our freedom are rooted in the history of English law, and we also know that many of the great legal arguments of 1776 were simply demands that certain basic rights of Englishmen be vindicated on this side of the Atlantic as well as in the mother country."

In the case of *Hawn* v. *Pope and Talbot, supra,* this Court clearly demonstrated that we were concerned with substantial justice and not any technicalities such as to which Court, or in which part of which Court, an action was being prosecuted.

Shipowners escape liability by assigning dangerous undertakings to independent contractors such as the discharging of cargo.

Our Admiralty Courts have not as yet adopted the principle of the British Courts, which impose the duty of due care for the safety of all employees working to further its ends. The English Law does not permit an employer to escape liability by the expedient of engaging an independent contractor.

The leading English case is *Rylands* v. *Fletcher,* 37 L. J. Ex. 161, L. R. 3 H. L. 330, 19 L. T. 220 (judicially

noticed by the English Courts as authority for the proposition of strict liability upon the principal as to third parties for negligence of contractors or sub-contractors in matters of dangerous callings).*

Liability should not be cancelled by the mere signing of an agreement with an independent contractor. The injured employee should not be compelled to accept a small fraction of his losses by reason of Workmen's Compensation Laws and assume the great bulk of his losses himself, nor should this loss be imposed on the community at large in supporting a disabled workman.

It is respectfully submitted that we adopt the British version of non-delegable duty of due care imposed on an employer engaging others in hazardous occupation, and that this principle of law be particularly adopted in Admiralty causes, wherein the shipowner engages independent contractors who work in utter disregard of the safety of their employees.

The fact that an employer can only be held chargeable for a fraction of the damages he causes by his lack of care, has two vices:

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* Plaintiff was the lessee of mines. Defendant was the owner of a mill standing on land adjoining that under which the mines were worked. He desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. Plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which connected with the land above, and which had been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir, it broke through some of the shafts, flowed through the old passages and flooded plaintiff's mines. Held that plaintiff was entitled to recover damages from the mill owner with respect to this injury.

1. Limited liability (Workmen's Compensation Laws) fosters carelessness.

2. Losses caused by a negligent employer (preventable by due diligence of a careful shipowner) are shifted in great part to the shoulders of the injured man or the general public.

The power lies within this Court to correct an injustice which has been permitted to flourish heretofore. Control over maritime matters is based on the provisions of the Federal Constitution granting general powers to legislate with respect to Admiralty and Maritime matters. *Stoffel* v. *W. J. McCahan Sugar Refining & Molasses Co.* (D. C. Pa.), 35 F. (2d) 602, affirmed *W. J. McCahan Sugar Refining & Molasses Co.* v. *Stoffel,* 41 F. (2d) 651.

Time has proven the soundness and justice of the British interpretation of law since the 13th Century, when the first Maritime Code (Laws of Oleron) prepared by Eleanor, Duchess Guienne, was introduced into England by her son Edward I and which constitutes the basis of all Maritime Codes of Europe.

This is more fully dealt with by Sir Henry Maine, Ancient Law, Chapter I, Page 12, 1st Am. from 2nd London ed., Charles Scribner, N. Y., 1864.

James Henry Willock, former Professor of Admiralty and International Law at the University of Miami, School of Law, Coral Cables, Florida, in his Commentary on Maritime Workers (preceding 46 U. S. C. A., § 688), demonstrates the power of judicial decision. He refers to the profound study of ancient and modern rights of seamen to maintenance and cure by Judge Story in the case of *Harden* v. *Gordon C. C. Me.,* 1823, Fed. Cas. No. 6047, 2 Mason 541, and concludes that the Maritime law generally was influenced by this decision.

Professor Willock makes a profound observation at page 216 of Title 46 U. S. C. A. when he refers to:

"THE BASIC LAW OF THE UNITED STATES

> In the Osceola the United States Supreme Court was called upon to determine the rights under the maritime law of the United States of a seaman injured in the service of his ship. The Court examined the ancient maritime codes as well as the modern maritime codes of the maritime nations saying: 'As the admiralty law upon the subject must be gathered from the accepted practice of courts of admiralty, both home and abroad, we are bound in answering this question to examine the sources of this law and its administration in the courts of civilized countries, and to apply it, so far as is consonant with our usages and principles, or, as Mr. Justice Bradley observed in The Lottawanna (*Rodd* v. *Heartt*) 21 Wall. 558, 88 U. S. 558, 22 L. Ed. 654, "having regard to our own legal history, Constitution, legislation, usages and adjudication." ' "

The English law as to the non-delegable duty of principals engaged in hazardous work to employees working thereat is summarized in Halsbury's Laws of England, 2nd Edition and Supplement, Volume XXIII, Sections 1004 and 1005:

> "1004. Where a legal duty is incumbent on a person, that duty is not discharged by employing a contractor who imperfectly performs it (*g*). Thus, where a person employs another to do work which does, or in the natural course of things will, involve or result in a duty towards a third party or towards the community, the employer cannot escape responsibility for the performance of that duty by employing some one else, however competent, to perform it,

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(*g*) *Cox* v. *Coulson*, [1916] 2 K. B. 177, C. A., *per* SWINFEN-EADY, L.J., at p. 182; 36 Digest 40, *242*.

even though the person so employed is an independent contractor and has agreed to assume the whole responsibility (*h*).

1005. Thus a defendant cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous (*i*), or is from its nature likely to cause danger

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(*h*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 829; 34 Digest 158, *1234*, approving *Bower* v. *Peale* (1876), 1 Q. B. D. 321; 36 Digest 99, *658*, and *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 34 Digest 126, *966*; *Cox* v. *Coulson, supra* (lessee of theatre liable to playgoer injured by negligence of independent contractor to whom the presentation of the play had been delegated); *Maclenan* v. *Segar*, [1917] 2 K. B. 325, at p. 333; 29 Digest 9, *120*; *Blake* v. *Woolf*, [1898] 2 Q. B. 426; 36 Digest 93, *615* (plumber employed to repair cistern which in consequence of defective work overflowed and caused damage to neighbour); *Milligan* v. *Wedge* (1840), 12 Ad. & El. 737; 34 Digest 29, *76*; *Rapson* v. *Cubitt* (1842), 9 M. & W. 710; 34 Digest 155, *1217*; *Upton* v. *Greenlees* (1855), 17 C. B. 30, *per* WILLES, J., at p. 71; 36 Digest 99, *656*; *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470; 36 Digest 51, *312*; *Butler* v. *Hunter* (1862), 7 H. & N. 826; 34 Digest 156, *1226*, as commented on in *Hughes* v. *Percival* (1883), 8 App. Cas. 443; 7 Digest 300, *240*; *Kiddle* v. *Lovett* (1885), 16 Q. B. D. 605; 34 Digest 222, *1850*; *Pearson* v. *Cox* (1877), 2 C. P. D. 369, C. A.; 36 Digest 21, *100* (builder); *Odell* v. *Cleveland House, Ltd.* (1910), 102 L. T. 602; 34 Digest 164, *1278*; cf. *Daniel* v. *Metropolitan Rail Co.* (1871), L. R. 5 H. L. 45, at p. 61.

(*i*) *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A., *per* A. L. SMITH, L.J., at p. 399; 34 Digest 163, *1271* (dipping benzoline lamp into a cauldron of molten lead on highway); *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48, P. C.; 34 Digest 162, *1266* (timber burning near adjoining property); *Hughes* v. *Percival, supra* (interfering with party wall); cf. *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A.; 34 Digest 161, *1255*. In *Lawrence* v. *Jenkins* (1873), L. R. 8 Q. B. 274; 36 Digest 99, *657*, the defendant, who was bound to maintain the plaintiff's fence, allowed a third party to fell timber with the result that the fence was damaged, and in consequence the plaintiff's cattle strayed and were injured: held that the defendant was bound to keep the fence up at his peril and was liable.

to others unless precautions are taken to prevent such danger (*k*)."

LAWS OF ENGLAND (REPLACEMENT) SUPPLEMENT.

1004. *Liability to Third Party.*

NOTE (*h*).—See also *Daniel* v. *Rickett, Cockrell & Co. and Raymond,* [1938] 2 K. B. 322; [1938] 2 All E. R. 631

(*k*) *The Snark,* [1900] P. 105, C. A.; 34 Digest 162, *1267* (raising a sunken barge in the Thames); *Dalton* v. *Angus, supra; Lemaitre* v. *Davis* (1881), 19 Ch. D. 281; 34 Digest 164, *1277*; *Hughes* v. *Percival, supra* (building causing injury to neighbor's house); *Bower* v. *Peate* (1876), 1 Q. B. D. 321; 36 Digest 99, *658*; *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 501; 34 Digest 166, *1296*; *M'Gill* v. *Bowman & Co.* (1890), 28 Sc. L. R. 144; 34 Digest 743, *r*; *Glass* v. *Paisley Race Committee* (1902), 5 F. (Ct. of Sess.) 14; *Brown* v. *Lewis* (1896), 12 T. L. R. 455; 36 Digest 99, *659* (duty incumbent on a building owner inviting public to a stand constructed by a contractor); *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470); 36 Digest 51, *312*; *Reedie* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; 34 Digest 159, *1243*; *Pinn* v. *Rew* (1916), 32 T. L. R. 451; 34 Digest 162, *1268* (drover employed to drive cow and calf on highway, there being evidence that a cow with a calf might become dangerous if it met a dog, which in fact occurred); *Brooke* v. *Bool,* [1928] 2 K. B. 578; Digest Supp. (looking for escape of gas with naked light); *Honeywill and Stein, Ltd.* v. *Larkin Brothers, Ltd.,* [1934] 1 K. B. 191, C. A.; Digest Supp. (where flashlight photographers employed to photograph premises negligently caused damage by fire); *Stewart* v. *Adams,* [1920] S. C. 129 (repairing boats with poisonous paint on grazing land); cf. *Wilson* v. *Hodgson's Kingston Brewery Co.* (1915), 85 L. J. (K. B.) 270; 34 Digest 159, *1242* (contractor not employed to do work dangerous to the public). It appears that a duty to take precautions arises where the owner of property becomes aware of something on his premises, even if that thing be there through the act of a stranger, which is a source of risk (*Silverton* v. *Marriott* (1888), 59 L. T. 61; 26 Digest 433, *1518*; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 315; 26 Digest 433, *1519*; *Palmer* v. *Bateman* [1908] 2 I. R. 393, C. A.; *Hill* v. *Tottenham Urban District Council* (1898), 15 T. L. R. 53; 26 Digest 404, *1268*; *Penny* v. *Wimbledon Urban District Council,* [1899] 2 Q. B. 72, C. A.; 26 Digest 410, *1308*; *Shoreditch Borough Council* v. *Bull* (1904), 20 T. L. R. 254, H. L., affirming S. C. (1902), 19 T. L. R. 64, C. A.; 36 Digest 34, *202* (interference with structure of a roadway)).

(cellar flap left unguarded by coal merchants); appld. in *Wilkinson* v. *Rea, Ltd.*, [1941] 1 K. B. 688, C. A.; [1941] 2 All E. R. 501; *Woodward* v. *Mayor of Hastings,* [1945] 1 K. B. 174, C. A.; [1944] 2 All E. R. 565.

1005. *Work Necessarily Dangerous.*

NOTE (*k*).—The principal is under a duty not only to take care but to provide that care is taken *The Pass of Ballater,* [1942] P. 112; [1942] 2 All E. R. 79, discussing *Honeywill's Case* (repairers of oil tanker liable for negligence of sub-contractor)).

Professor Willock further stated on page 216:

> "2. That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seaman in consequence of the unseaworthiness of a ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. Scarff v. Metcalf, 1887, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807, 11 St. R. 396."

The cargo platform which was unfit for the purpose intended and which was the proximate cause of the accident by reason of its inherently dangerous and unsafe condition was unseaworthy.

THIS UNSEAWORTHY APPLIANCE WAS USED IN HANDLING CARGO, A LABOR TRADITIONALLY PERFORMED BY SEAMEN.

CONCLUSION

Petitioner respectfully requests a rehearing of her petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the following grounds:

1. That the Supreme Court of the United States established a principle of law on December 7, 1953 in No. 13, October Term, 1953, in *Pope & Talbot, Inc.*, v. *Charles Hawn and Haenn Ship Ceiling and Refitting Corporation*;

on writ of certiorari to the United States Court of Appeals for the Third Circuit after the petition for a writ of certorari herein was denied. The principle of law is one and the same in both matters.

2. The laws of the United States treating with Admiralty torts have lagged far behind the more modern and just laws adopted by England. Modern civilization demands an interpretation of existing Admiralty laws to the end that shipowners will no longer be permitted to escape liability for negligent conduct and dangerous equipment causing crippling and fatal accidents. The medium of assigning dangerous work to independent contractors, which contractors in turn fail to appreciate their responsibility and shift the consequential results of their wrongs, to the shoulders of the victims of accidents or on to the general public is archaic, unsound and unjust.

These are matters of general and national concern to industry and labor.

JACOB RASSNER,
Attorney for Petitioner.

WILLIAM W. HEIBERGER,
HARVEY GOLDSTEIN,
of Counsel.

I hereby certify that I am the proctor for the libelant-appellee-appellant in the above entitled case; that the foregoing Petition for a Rehearing is filed in good faith, upon a real and substantial ground and not for the mere purpose of delay.

JACOB RASSNER.

Dated: New York, N. Y., December 14, 1953.